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No. 85-1662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS WALKER,

Petitioner,

—v.—

TIME LIFE FILMS, INC., DAVID SUSSKIND, GILL CHAMPION, MARTIN RICHARDS and HEYWOOD GOULD,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Response to Questions Presented

The case that petitioner asks this Court to consider has already been reviewed and rejected by one State and four federal judges. Petitioner continually modifies and complicates his arguments in a futile attempt to obfuscate the plain conclusion below that "no reasonable observer could find substantial similarity between the protectible elements of plaintiff's book and defendants' movie." 784 F.2d 44, 46 (2d Cir. 1986).

This practice continues on this Petition. None of these evasions, however, can obscure the fact that no difficult or novel legal issues have ever been presented by this garden-

variety copyright case, which was properly dismissed after comprehensive comparisons of petitioner's book and respondents' film. Since these comparisons were made—independently by the two courts below—on the basis of a settled legal standard, petitioner's unhappiness with the result raises no question worthy of review by this Court (except the frivolous nature of the Petition itself).

The Petition (Pet. 37-39),* for the first time in the long history of this case, argues that different standards should be applied to alleged copying and a claimed violation of the "right to prepare derivative works." This assertion has recently been characterized as "frivolous." *Litchfield* v. *Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1753 (1985). Moreover, the question is an abstract one here because the finding below of the complete *dis*similarity between the book and the film precludes any conclusion of infringement regardless of whether the test is "substantial similarity," "based upon" or "derived from."

Petitioner also makes a series of arguments variously based on the Court's opinion in *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, ____ U.S. ____, 105 S.Ct. 2218 (1985). That case, however, involved conceded infringement of an unpublished manuscript and the invocation of the affirmative defense of fair use—a far cry from this case, where the Court of Appeals properly found that no reasonable trier of fact could infer any copying from petitioner's book.

In reaching its unanimous conclusion that the grant of summary judgment was proper, the Court of Appeals made a careful *de novo* review of the two works at issue and considered petitioner's numerous claims of similarity. Its amply supported conclusion that no "substantial similarity"

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* "Pet. ____" will be used hereinafter to refer to page numbers in the Petition for Writ of Certiorari.

could be found to any copyrightable material in petitioner's book settled the sole question in this case. Respondents therefore urge that certiorari be denied absent a clear showing that the Court of Appeals erred in affirming summary judgment or that its holding is in conflict with any of this Court or of another Court of Appeals.

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STATEMENT OF THE CASE

Petitioner's Statement of the Facts (Pet. 5-7) is only partially accurate. The Petition seeks review of the Court of Appeals' unanimous affirmance, 784 F.2d 44, of the District Court's grant of summary judgment dismissing petitioner's complaint for copyright and related claims.[1]

On February 6, 1981 respondents released a film entitled "Fort Apache, The Bronx," based on an original screenplay. The conception for the film arose in the late 1960's or early 1970's as a result of news reports of a world of violence in the 41st Precinct of the South Bronx, by then already commonly referred to as "Fort Apache." In writing the screenplay respondent Heywood Gould ("Gould") relied in part on conversations with South Bronx police officers as well as on news articles concerning the area.

Petitioner, a former police officer who served in the 41st Precinct for approximately one year in the early 1970's, published a book about his experiences in 1976. He alleged that in 1972 Gould visited the 41st Precinct and was given access to petitioner's manuscript draft of his book for approximately two hours or less. While petitioner has never claimed textual copying, he alleged that ideas from his manuscript were used by respondents in making their film. Although Gould, in a sworn statement, set forth that he has never met or spoken with petitioner, never saw his manuscript or the book and did not visit the 41st Precinct until 1979, respondents conceded access to petitioner's manuscript for *purposes of the summary judgment motion only.* The District Court, in a 26-page opinion, granted summary judgment after a first-hand comparison

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1 Prior to his federal action, petitioner filed a complaint—nearly identical to the complaint herein—in New York State court alleging copyright and related common law claims. The State court held that all the common law claims duplicated and were preempted by the copyright claim, which had to be prosecuted in federal court. Shortly after entry of judgment dismissing the State court action in its entirety, the instant complaint was filed.

of petitioner's book and respondents' film. Petitioner had never demanded a jury trial.

On appeal, the Court of Appeals stated that "[e]ach of the panel members has read the book and viewed the film." 784 F.2d at 49. Following this *de novo* review of the works themselves, *see Litchfield* v. *Spielberg*, 736 F.2d at 1356, the Court in an 18-page opinion concluded as a matter of law that little of the material in petitioner's book is sufficiently novel and unique in expression to merit copyright protection and that none of the remainder is "substantially similar" to anything in respondents' film.[2]

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2 The Court of Appeals found similarity at only the most general of levels and stated "the notion of telling a police story that takes place [in the South Bronx] cannot be copyrightable." 784 F.2d at 50. After conscientiously reviewing petitioner's numerous claimed similarities, the Court concluded that they "either fail to materialize or prove entirely insubstantial." *Id.*

ARGUMENT

POINT I

PETITIONER'S BELATED INCANTATION OF THE "RIGHT TO PREPARE DERIVATIVE WORKS" DOES NOT ALTER THE PROPRIETY OF THE DECISION BELOW

Running variously through the Petition are *non sequitur* references to the right "to prepare derivative works based upon the copyrighted work," 17 U.S.C. § 106(2), and the right "to reproduce the copyrighted work," 17 U.S.C. § 106(1). The Petition asserts conclusorily that differences between these provisions—although never raised in any of the prior hearings this case has received—somehow afford petitioner rights which were ignored below. To the extent these provisions differ, however, the distinctions have nothing to do with petitioner's absolute and fatal failure to establish "substantial similarity."

A "derivative work" is defined as

> "a work based upon one or more pre-existing works such as a . . . dramatization, fictionalization, motion picture version . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. . . ."

17 U.S.C. § 101. A work is not derivative unless it has "substantially copied" from a prior work. *Reyher* v. *Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). *See* A. Latman, *The Copyright Law* at 175 (5th ed. 1979). In order to violate an author's rights under 17 U.S.C. § 106(2), the infringing work must incorporate some portion of the copyrighted work. Notes to the Committee on

the Judiciary, House Report No. 94-1476, *reprinted in* 17 U.S.C. § 106(2) (1982).[3]

> If the allegedly infringing work
>
> "does not incorporate sufficient of the preexisting [copyrighted] work as to constitute an infringement of either the reproduction right, or of the performance right, then it likewise will not infringe the right to make derivative works because no derivative work will have resulted."

2 M. Nimmer, *Nimmer on Copyright* § 8.09 at 8-110.2 (footnotes omitted). *See Midway Mfg. Co.* v. *Artic International, Inc.*, 547 F. Supp. 999, 1013-14 (N.D. Ill. 1982), *aff'd*, 704 F.2d 1009 (7th Cir.), *cert. denied*, 464 U.S. 823 (1983). In short, the unauthorized incorporation of any substantial part of a protected work in a "derivative work" is simple copyright infringement.[4] *See, e.g., Douglas International Corp.* v. *Baker*, 335 F. Supp. 282 (S.D.N.Y. 1971). *See, also, Cortner* v. *Israel*, 732 F.2d 267 (2d Cir. 1984).

In order to be a "derivative work" the borrowed material must relate to the *original expression* given to ideas in the copyrighted work and not merely to ideas or facts or true

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3 In cases, like this, *not* involving the interplay of separate copyrights on an "underlying work" and a "derivative work," *compare, e.g., Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484 (2d Cir.), *cert. denied*, 431 U.S. 949 (1977), there are few distinctions between copying and violation of the right to prepare derivative works. Indeed, since a derivative work must be closely "based upon" a pre-existing work, which would necessarily involve some copying of substance, it has been said that the "right 'to prepare derivative works . . .' may be thought to be completely superfluous. . . ." 2 *Nimmer* § 8.09 at 8-110.2 (1985).

4 It is not surprising that whenever § 106(2) or its predecessor right under the 1909 Copyright Act is invoked, the cases are also treated, in the alternative, as claims of infringing copying. *See, e.g., Litchfield* v. *Spielberg*, 736 F.2d 1352 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1753 (1985); *Benny* v. *Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd*, 356 U.S. 43 (1958).

events. *Reyher* v. *Children's Television Workshop*, 533 F.2d at 90. *See* P. Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copr. Soc'y, 209, 231, Item 442 (1983). Thus, the findings below of similarity only as to the uncopyrightable *idea* of setting a police drama in the Bronx, or the inevitable elements of drugs, crime, garbage or prostitutes in such a milieu, are dispositive of the claim that respondents' film was "derived from" or "based upon" any original and protectible aspects of petitioner's book.

Petitioner's strenuous efforts to characterize respondents' film as a "derivative work" are futile because his argument that "substantial similarity" need not be shown to establish infringement under 17 U.S.C. § 106(2) is simply wrong. *Litchfield* v. *Spielberg*, 736 F.2d at 1357-58; *Harry Fox Agency, Inc.* v. *Mills Music, Inc.*, 543 F. Supp. 844, 849 (S.D.N.Y. 1982), *rev'd on other grnds*, 720 F.2d 733 (2d Cir. 1983), *rev'd on other grnds sub nom.*, *Mills Music, Inc.* v. *Snyder*, ____ U.S. ____, 105 S.Ct. 638, *aff'd without op.*, 779 F.2d 35 (2d Cir. 1985); *United States* v. *Taxe*, 540 F.2d 961, 965 n.2 (9th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977). *See also* 2 *Nimmer* § 8.09[B][3] & nn. 22-24. Indeed, it has been stated that the "novel proposition" that § 106(2) does not require substantial similarity and has "altered the protection afforded by the law of copyright [is] frivolous." *Litchfield* v. *Spielberg*, 736 F.2d at 1357. *See Berkic* v. *Crichton*, 761 F.2d 1289, 1291 n.1 (9th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 85 (1985).

The implication (Pet. 33) that the Court of Appeals' decision conflicts with *WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982), is plainly incorrect. *WGN* held that copyright protection for a broadcast program could extend to certain "teletext" signals encoded into the program's tape. This was the only novel question in *WGN*, and Judge Posner stated that upon its resolution the case could be treated as one of simple copyright "infringement under familiar principles." 693 F.2d at 625. Both *WGN* and *Gilliam* v.

American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976), also relied on by petitioner, involved the partial editing of copyrighted television programs to create literal copies of large portions of the protected works. It was not disputed that the infringing works in those cases, being edited copies of the originals, were "substantially similar"—indeed, *identical*—to extensive parts of the copyrighted works. These cases lend no support whatsoever to petitioner's argument that a claim of deletion from a copyrighted work eliminates or alters a plaintiff's burden of proving "substantial similarity" to the allegedly copied portions of the protected work.[5]

In the instant case, petitioner has never claimed that any portion of respondents' film involves literal copying from his book. Thus, he must still prove substantial similarity to copyrightable material in his work. *See Berkic* v. *Crichton*, 761 F.2d at 1291 n.1. Here, two federal courts have made independent comparisons of the book and the film and have concluded that no reasonable trier of fact could find substantial similarity to any protectible material in petitioner's book.

POINT II

THE COURT'S DECISION IN *HARPER & ROW* RAISES NO ISSUES REQUIRING GRANT OF THE WRIT IN THIS CASE

The Petition refers to *Harper & Row, Publishers, Inc.* v. *Nation Enterprises* as support for a series of miscellaneous points. The distinctions between that case and this, however, are so numerous and fundamental that perhaps *Harper & Row's* only relevance here is its reaffirmance of the distinction

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5 Nor was there any question in *WGN* or *Gilliam* that the plaintiffs' works were both copyrightable and copyrighted. Here, petitioner failed to show that whatever in the book and film may have been similar related to anything other than uncopyrightable general ideas and facts. 784 F.2d at 50.

between copyrightable original expression and uncopyrightable facts and ideas. 105 S.Ct. at 2229-31. It was largely on the basis of this distinction that this case was properly dismissed.

As a threshold matter, *Harper & Row* is inapplicable because the respondent therein conceded substantial *verbatim* copying which it further admitted would constitute infringement unless excused as "fair use" under § 107 of the Copyright Act of 1976. 105 S.Ct. at 2224. Thus the case dealt with a statutory defense to admitted infringement and, unlike this case, there was no dispute as to "substantial similarity." Moreover, it was not questioned that the verbatim quotes from President Ford's memoirs qualitatively embodied the author's "distinctive expression" and the "heart" of his original work. 105 S.Ct. at 2233.

The Court in *Harper & Row* concluded that a "key" factor in assessing claimed "fair use" was the fact that the infringement involved the publication of an *unpublished* manuscript in a deliberate attempt to "scoop" its first appearance elsewhere as planned by the author and his assignees. 105 S.Ct. at 2221, 2227. Central to *Harper & Row* was the Court's determination to protect the "right of first publication" under 17 U.S.C. § 106(3) that attaches to an *unpublished* work and is "inherently different from other § 106 rights. . . ." 105 S.Ct. at 2227.

Moreover, unlike *Harper & Row*, this case has never involved a claim of "fair use," or any other defense, in the face of admitted copying. On the contrary, infringement has always been denied here and the central issue below was "substantial similarity." Unlike the significant legal issues relating to the fair use defense in *Harper & Row*, the Second Circuit's opinion here is not a candidate for review by this Court because it was based on settled legal principles that led to the inevitable conclusion that there were no triable issues of fact on the question of infringement.

Finally, *Harper & Row* hardly requires a grant of the Writ merely because the Petition (p.32) quotes the Court's reference

to the issue of how "uncopyrightable elements combine with the author's original contributions to form protected expression." 105 S.Ct. at 2224. That issue need not be reached here because the Court of Appeals properly found that whatever similarities may exist between the two works relate solely to the most general level of uncopyrightable ideas and facts. The close analysis given the book and the film below demonstrated that uncopyrightable "stock" scenes and true events were given "radically" different treatments in their expression, structure and characterization in the two works. 784 F.2d at 49-51. Whatever did constitute petitioner's "original contribution" simply does not appear in any form in the film.[6] As the Second Circuit concluded, "the claimed similarities either fail to materialize or prove entirely insubstantial." 784 F.2d at 50.

POINT III

PETITIONER'S CLAIMED "COMMON LAW COPYRIGHT" WAS ABOLISHED BY THE 1976 COPYRIGHT ACT AND WAS, IN ANY EVENT, EXTINGUISHED UPON PUBLICATION OF HIS BOOK

Petitioner makes various references to "common law copyright" and suggests that since his complaint alleged that respondents had access to his manuscript prior to its publication in 1976, he has rights additional to those recognized by the Copyright Act of 1976.

This confused reading of the statutory scheme gains petitioner nothing. As shown above, petitioner published his book in 1976 while respondents did not release their film to the public until February 1981. Whatever common law rights

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6 This contrasts sharply with *Harper & Row*, where the defendants' own publicity for their verbatim use of the unpublished manuscript proved that they had "quoted these passages precisely because they qualitatively embodied Ford's distinctive expression." 105 S.Ct. at 2233.

petitioner assertedly had could not have arisen until the latter date, the time of respondents' first act of publication and the earliest conceivable point at which respondents could have interfered with any State law right.[7] *Estate of Hemingway* v. *Random House, Inc.*, 53 Misc.2d 462, 464, 279 N.Y.S.2d 51, 55 (Sup. Ct. N.Y. Co.), *aff'd*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341, 345-46, 296 N.Y.S.2d 771, 776 (1968). *See American Vitagraph, Inc.* v. *Levy*, 659 F.2d 1023 (9th Cir. 1981). However, the Copyright Act of 1976 expressly preempted and abolished all equivalent common law copyright claims arising after January 1, 1978. 17 U.S.C. §§ 301(a), (b)(2). *See Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

Even assuming, *arguendo*, that petitioner had had some common law copyright claim that arose prior to January 1, 1978, that right would apply only to his *unpublished* manuscript. Copyright Act of 1909, 17 U.S.C. § 2. Any such right, however, was "extinguished immediately upon publication of the work" by petitioner in 1976. *Estate of Hemingway* v. *Random House, Inc.*, 23 N.Y.2d 341, 346 n.1, 296 N.Y.S.2d 771, 776 n.1 (1968). As to any alleged infringement thereafter, including the publication of respondents' film in 1981, petitioner must rely exclusively on federal statutory copyright and his suggestion otherwise is meritless.

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7 Petitioner confuses an erroneously claimed legal right with a purely evidentiary issue by insisting there is relevance in the fact that he claims copying from his draft manuscripts as well as from his finished book. (Pet. at 30). Because the sole test of infringement is substantial similarity of the works in their final form as displayed to the public, *Davis* v. *United Artists, Inc.*, 547 F. Supp. 722, 724 (S.D.N.Y. 1982), petitioner's early drafts were rendered irrelevant by respondents' concession of access *for purposes of the summary judgment motion only*. The Court of Appeals properly concluded that, *even assuming*, both access and borrowing from petitioner's early drafts, since no reasonable observer could find substantial similarity between the final works as published, there was no need to consider the drafts even as evidence of preliminary borrowing. 784 F.2d at 52.

POINT IV

THIS CASE IMPLICATES NO CONFLICT IN THE CASE LAW

As shown above (pp. 5-6), petitioner's argument that a conflict among the Circuits exists regarding "derivative works" is meritless. Regardless of whether the issue is "copying" or a claimed "derivative work" "based upon" another work, the courts uniformly require "substantial similarity" for a conclusion of infringement.

The Petition also argues (Pet. 35-36) that there is conflict in the case law as to the procedures to be used in determining "substantial similarity." It may be true that in individual cases difficulties can arise in applying the "idea-expression dichotomy," *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977), which permits expert testimony as to similarity of ideas or themes but not as to similarity of expression, which is to be tested by the impressions of the "ordinary lay observer." *See Arnstein* v. *Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947); *Davis* v. *United Artists, Inc.*, 547 F. Supp. 722, 724 & n.8 (S.D.N.Y. 1982). Even assuming such difficulties, however, the Petition has failed to show any clear conflict among the Circuits.[8] *See* N. Boorstyn, II *Copyright Law Journal* 86, 87 (April 1986) ("*Arnstein* test for substantial similarity is virtually a mirror-image of the Ninth Circuit's extrinsic-intrinsic test set forth in *Krofft*. . . .")

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8 In any event, even if there were some conflict, the issue would not be reached in this case because the admission of expert testimony below for limited purposes would be at most harmless error in light of the finding "that no trier of fact could find the works substantially similar in their protectible aspects." 784 F.2d at 52. Petitioner's implied suggestion that there was error in the admission of expert testimony is curious in the face of his own submission of such testimony which was in fact considered below. Indeed, the Petition itself in an "addendum" improperly submits further "expert" testimony—in a new form not seen heretofore by respondents.

Finally, by his own description of *SAS Institute, Inc.* v. *S&H Computer Systems, Inc.*, 605 F. Supp. 816 (M.D. Tenn. 1985) and *Atari, Inc.* v. *North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982), as cases questioning the "ordinary lay observer" test for "technical" computer cases, petitioner distinguishes those cases from this case, which involved traditional literary forms obviously proper for comparison by the ordinary observer.

CONCLUSION

The Court should deny the Petition for Certiorari.

Respectfully submitted,

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